No. 97-1927

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, et al.,

Petitioners,

v.

PAUL W. BERGER, et ux., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR RESPONDENTS CABLE NEWS NETWORK LP, LLLP, TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, AND JACK HAMANN IN SUPPORT OF PETITIONERS

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Due to a business restructuring effective January 1, 1999, Cable News Network, Inc. has changed its name and its legal relationship with Turner Broadcasting System, Inc ("TBS"). Cable News Network, Inc. has become a limited liability limited partnership, now known as "Cable News Network LP, LLLP" ("CNN"). The general partner of CNN is TBS, and the limited partner is CNN Investment Company, Inc. Neither TBS nor CNN has any nonwholly owned subsidiaries.

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ARGUMENT

Respondents Cable News Network LP, LLLP, TBS, Robert Rainey, Donald Hooper, and Jack Hamann (collectively "CNN") do not take issue with Paul and Erma Berger's restatement of the bedrock constitutional " 'right of a man to retreat into his own home' and there be free from unreasonable governmental intrusion." Resp. Br. at 13 (quoting *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992)). However, the issue[1] here is whether reasonable government intrusion – supported by probable cause and a valid, specific warrant in the case of the open fields search, and Berger's consent in the case of the entry in the home – is made unreasonable merely as a result of permitting members of the news media to ***observe***.[2] Respectfully, CNN submits the answer is no.

Below, CNN addresses the issues the Bergers raise in their brief. First, Berger's consent to the Fish and Wildlife Service ("FWS") agents' entry to his home was voluntary and their entry objectively reasonable. Second, the absence of any mention of CNN in the warrant is constitutionally irrelevant; rather, the reasonableness standard

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[1] The issue here ***is not*** whether government may "authorize unlimited and uncontrolled access to private parties." Resp. Br. at 20.

[2] The claim that CNN searched for or seized ***anything*** is devoid of any factual support. There is ***no*** evidence that CNN "roam[ed] throughout the ranch and its buildings," and the agents and CNN ***do not*** argue CNN was "authorized to search and seize not merely evidence, but anything of interest." *Id.* at 21, 18. CNN remained at all times under the immediate supervision of the agents, observing their execution of the warrant. The fact that CNN did not search for or seize anything also entirely undercuts the Bergers' reliance on 18 U.S.C. § 3105 which limits who may "serve" a federal warrant, not who may ***witness*** such service.

affords the proper measure. Third, the Bergers' unawareness that their knowing conversations with the agents were being recorded does not make reasonable an otherwise unreasonable privacy expectation. Last, in determining the constitutionality of CNN's presence as a mere observer to the warrant's execution, the specter of pre-colonial general warrants and writs of assistance is inapposite.

A. The Agents' Several Entries into the Bergers' Home Were Consensual and Reasonable.

The Bergers do not contest that the open fields doctrine applies to the agents' search of their ranchlands and outbuildings. Because the Fourth Amendment did not protect any subjective expectation of privacy of the Bergers in the open fields of their 75,000-acre ranch, the Fourth Amendment was not violated by any conduct occurring there, including the agents granting CNN permission to observe the search of the ranchlands and outbuildings.[3] CNN Br. at 10-20. Consequently, the Bergers press their Fourth Amendment claims on the basis of the agents' entry into the Bergers' home, even though that entry undisputedly resulted in no search or seizure. R. 4,

[3] The Bergers do suggest that "[o]btaining the warrants was a procedural acknowledgment of the expectations of privacy to be protected." Resp. Br. at 15. However, as Magistrate Judge Anderson held in the criminal proceedings against Mr. Berger, the agents did not need a warrant to search the Bergers' open fields. R. 5, Ex. G, at 4-5. The prudent procurement of a warrant does not make an otherwise unrecognized privacy expectation objectively reasonable. (The excerpts of record ("R.") refer to the two volumes submitted by the Bergers in their appeal in *Berger v. Hanlon*, 9th Cir. Cause No. 96-35261. The initial reference is to the tab number within the record.)

Ex. B at 108:11-12. However, this argument fails because Berger consented to the entry into his home.

"The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). The Court has "long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Id.* at 250-51; *accord Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) ("a search authorized by consent is wholly valid"). A request for permission to search does not implicate the Fourth Amendment "so long as the officers do not convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 437 (1991).[4] The Bergers do not dispute they granted the agents permission to enter the home; rather, they argue the agents "coerced the Bergers to submit to these searches" by misleading them into believing the warrant covered the home and by threatening to arrest Mr. Berger. Resp. Br. at 23, 28-29. The Bergers are wrong on both accounts.

[4] The Bergers cite *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the proposition that "consent to enter cannot be voluntary when the request is made by federal law enforcement." Resp. Br. at 29. In support of this reading of *Bivens*, they cite a passage in which the Court distinguished the legal effects of private and police "***demands***" for admission to another's home. 403 U.S. at 394 (emphasis added). The Court's distinction came in the context of rejecting the federal agents' arguments that the remedy for an unconstitutional police entry into the home should be the same as that of a private party, namely, by state trespass or invasion of privacy law. *Id.* Plainly, however, *Bivens* ***does not*** stand for a proposition that law enforcement agents' presence is so inherently coercive that consent may not be recognized.

1. The Agents' Consensual Entry Into the Bergers' Home Was Objectively Reasonable.

The scope of a defendant's consent under the Fourth Amendment is measured by objective reasonableness: "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Jimeno*, 500 U.S. at 251. The Ninth Circuit held Berger consented to the agents' initial entry into his home. Pet. App. 6a. This holding amply is supported by uncontested facts. As Berger testified, ***before*** the agents entered his property ***they showed him the search warrant***. J.A. 93 ¶ 4; R. 4, Ex. B at 101:16-17. ***Twice*** the brief text of the warrant's first page plainly stated the home was excluded from the property to be searched. J.A. 17.[5] It was shortly ***after*** seeing the warrant that Berger approved the agents' entry into his home to explain to his wife why they were present on the ranch. R. 8, Ex. 8, tape 7, pages 15-16.

Upon his invitation, two agents entered his home and also explained their need to control any weapons on the ranch to ensure their safety during the search. *Id.* page 9. Berger told them the guns were in the house. *Id.* page 18. They stated their desire to remain with him during the search. *Id.* page 25; R. 7, at 6 ¶ 15. *Cf. Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) ("Establishing a face-to-face confrontation diminishes the possibility, otherwise

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[5] Considering the warrant's plain exclusion of the home and the agents' explanation that they sought evidence of wildlife poisoning, R. 4, Ex. B at 102:2-6, 24, 103:1-2; R. 8, Ex. 8, tape 7, pages 3-4, the statement that the warrant authorized a search of the "buildings" could not reasonably have been understood or intended to include the house.

substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.").

It was in this context, as the agents searched the open fields, that they returned to the home with Berger several times. Beyond staying by his side to avoid any danger to themselves, they did not search the home for anything, R. 4, Ex. B at 108:11-12, and he did not object to the agents keeping him in sight.

The Bergers assail the initial and subsequent entries of the agents into the Bergers' home that day. However, the reasonableness of such entries thoroughly was justified by Berger's consent and his failure thereafter to object to further entries to his home. *See, e.g., United States v. Stapleton*, 10 F.3d 582 (8th Cir. 1993); *United States v. Mejia*, 953 F.2d 461 (9th Cir. 1991); *United States v. Pena*, 920 F.2d 1509 (10th Cir. 1990); *United States v. Sierra-Hernandez*, 581 F.2d 760 (9th Cir. 1978).

In *Stapleton*, police stopped a car and obtained the driver's consent to search it. The passenger/defendant – later convicted based on a search of his property in the car – remained silent after being told of the intended search and its object. The court held that:

> Given [the passenger/defendant]'s silence in such circumstances, it was objectively reasonable for the patrolmen to conclude either that they had all the consent that was constitutionally required (from [the driver]), or that they had [the passenger/defendant]'s implied consent.

10 F.3d at 584.

In *Mejia*, police officers knocking on defendant's door were greeted by his wife. Upon identifying themselves and that they had come pursuant to a narcotics investigation, the wife let them in. When the officers asked her of her husband's whereabouts she indicated that he was

asleep in the bedroom. The officers followed, without any protest from the wife, as she walked into the bedroom. The court noted that the wife's invitation to enter the home did not subsume permission to enter the bedroom. However,

> once the officers were in the house, [the wife] gave a subsequent implied consent to let them enter the bedroom by not objecting when the officers followed her into the bedroom. Presumably, a reasonable person who objected to the officers' following her would have said so.

953 F.2d at 466. The court noted that even if defendant's wife actually felt uncomfortable objecting to the officers following her into the room (which she never expressed to them), "[t]he overt manifestations of consent existed" and supported the officers' entry into the bedroom. *Id.*

In *Pena*, an officer stopped the defendant on a highway, obtained his consent to search the trunk and look inside his car, and, after searching there, removed a vent with a screwdriver. While the vent was removed, the defendant walked fifteen feet away from the car and ignored the officer. Cocaine was found in the vent. The court affirmed denial of defendant's suppression motion, explaining:

> At no time did he object to or express any concern about the officer's activities. He never attempted to limit or retract his consent. . . . [F]ailure to object to the continuation of the search under these circumstances may be considered an indication that the search was within the scope of the consent.

920 F.2d at 1515 (quotation marks and citation omitted).

In *Sierra-Hernandez*, the court affirmed denial of defendant's suppression motion where he consented to a search inside his truck and did not object or retract or narrow his consent when the officer opened the hood

(where he would find drugs). In an opinion by then-Judge Kennedy, the court held that "[f]ailure to object to the continuation of the search in these circumstances is properly considered as an indication that the search was within the scope of the initial consent." 581 F.2d at 764.

As in *Stapleton*, *Mejia*, *Pena* and *Sierra-Hernandez*, Berger never limited or withdrew his initial consent and the agents behaved objectively reasonably in understanding that they had his consent to keep him within their sights.

2. The Bergers' Consent Was Not the Product of Any Coercive Measures.

The Bergers utterly misrepresent the record to argue their consent was a result of the agents having "threatened Mr. Berger with imprisonment if he did not submit to the federal authorities." Resp. Br. at 29.[6] The so-called "threat" did not come until significantly ***after*** he consented to the agents' entry to his home and ***after*** they entered it. In fact, they were exceedingly unthreatening with the Bergers, R. 8, Ex. 8, tape 7, page 7, and it was only when the search of the outbuildings began and Berger sought to interfere with the seizure of poison that jail was mentioned, and the warning was, at most, a gentle one:

> Joel Scrafford: "Alright, we'll get it, but I want you to stand back out of the way now. I don't want you gettin' upset, you can't breathe."
>
> Paul Berger: "I'm GONNA get upset here goddamn quick!"

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[6] The Bergers' contention that the agents also "gained entrance to the . . . home . . . by armed force," Resp. Br. at 23, is absurd, and, not surprisingly, supported by no citation to the record.

> Joel Scrafford: "If you get upset, I'm gonna have to take you into Billings, and – and put you in the lockup. And I don't want to do that. . . . "

R. 8, Ex. 8, tape 8, page 3.

Consequently, as a matter of law and fact the Bergers consented to the agents' entry into their home without being subject to any coercion, and the agents' entry, being objectively reasonable under the circumstances, did not violate the Fourth Amendment.

B. The Fourth Amendment Was Not Violated By the Absence in the Warrant of Specific Authorization for CNN to Observe the Agents' Search.

The Bergers contend agents may only take actions specifically approved in a warrant, making unconstitutional for want of authorization the grant of permission to CNN to observe the warrant's execution. However, search warrants "require only three things": issuance by an independent magistrate, probable cause that evidence or the suspect of a crime will be found, and a particular description of the things to be seized and the place to be searched. *Dalia v. United States*, 441 U.S. 238, 255 (1979).

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to [these] three requirements . . . , search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant – subject of course to the general Fourth Amendment protection "against unreasonable searches and seizures."

Id. at 257 (footnote omitted). Thus, for example,

> [n]othing . . . indicates that officers requesting a warrant would be constitutionally required to set forth the anticipated means for execution even in those cases where they know beforehand that unannounced or forced entry likely will be necessary.

Id. n.19.

In arguing that the Fourth Amendment was violated by the warrant's failure to mention CNN, the Bergers rely on a line of cases in which the Court considered the propriety of ***warrantless***[7] police action and cases challenging the ***specificity of the warrant's description of the items to be seized.***[8] However, the Court treats with a

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[7] *Id.* at 15-16 (citing *Payton v. New York*, 445 U.S. 573 (1980) (warrantless, forceful entry in home to make routine felony arrest); *United States v. United States Dist. Court*, 407 U.S. 297 (1972) (warrantless electronic surveillance); *Wong Sun v. United States*, 371 U.S. 471 (1963) (warrantless arrest in home based on mere suspicion); *Abel v. United States*, 362 U.S. 217 (1960) (warrantless search and seizure of alien suspected of crime while in INS custody but not arrested); *Johnson v. United States*, 333 U.S. 10, 11 (1948) (warrantless arrest and search)). The Bergers cite *Payton* for the proposition that "any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed." Resp. Br. at 15-16. However, the language cited is that of the dissent of the New York Court of Appeals, ***not*** the language of this Court. 445 U.S. at 582 n.17. Moreover, unlike the entry into the Bergers' home, the Court emphasized in *Payton* that it was "dealing with entries into homes made without the consent of any occupant." *Id.* at 583. As in *Payton*, the defendant in *Abel* also did not consent to the search. *Abel*, 362 U.S. at 223.

[8] Resp. Br. at 16 (citing *Andresen v. Maryland*, 427 U.S. 463 (1976) (broad descriptive terms in search warrant); *Marron v. United States*, 275 U.S. 192 (1927) (seizure of items not listed in warrant)). It was in the particular context of a search of papers and telephone conversations – in contrast with "executing a

greater measure of deference searches conducted pursuant to precise warrants – as here – than it does warrantless searches or searches conducted pursuant to imprecise warrants.

In *United States v. Ventresca*, examining the sufficiency of the affidavit underlying a warrant, the Court noted: "We begin our analysis of this constitutional rule mindful of the fact that in this case a search was made pursuant to a search warrant." 380 U.S. 102, 105 (1965). The Court emphasized its "strong[ ] support[ ] [for] the preference to be accorded searches under a warrant, [and] indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *Id.* at 106 (citation omitted).[9] Thus, the Court held as to the issue before it that "[a]lthough in a particular case

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warrant to search for physical objects whose relevance is more easily ascertainable" – that the Court in *Andresen* warned, as cited by the Bergers, that " 'responsible officials, including judicial officials, must take care to assure that [such searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy.' " *Id.* at 16-17 (quoting *Andresen*, 427 U.S. at 482 n.11). The Court explained there that in a search for papers and telephone conversations, there exists a far greater chance that irrelevant, private information will be revealed than in the run-of-the-mill search for physical objects. 427 U.S. at 482 n.11. In contrast, the Bergers do not allege the agents' open fields search or presence in their home revealed irrelevant, private information.

[9] *See also United States v. Leon*, 468 U.S. 897, 913-14 (1984) ("Because a search warrant 'provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a[n] officer' . . . , we have expressed a strong preference for warrants and declared that 'in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.' ") (citations omitted).

it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Id.* at 109.

Thus, where, as here, the warrant was issued by an independent magistrate, was supported by probable cause, and particularly detailed the items to be searched for and the places to be searched, it need not recite the means of its execution; rather, the means of executing the warrant are tested under the Fourth Amendment's reasonableness standard. *See, e.g., Richards v. Wisconsin*, 520 U.S. 385 (1997) (despite magistrate's refusal to issue no-knock warrant, no-knock entry pursuant to standard warrant held reasonable where police suspected evidence would be destroyed otherwise); *Horton v. California*, 496 U.S. 128 (1990) (seizure of evidence in plain view that officers hoped and expected to find during search pursuant to warrant for other items is reasonable); *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (detention, search of occupant during warranted search of home reasonable because warrant implicitly carries authority to do so); *Dalia*, 441 U.S. at 258-59 (covert entrance to install surveillance device pursuant to warrant reasonable despite lack of warrant authorization for covert entry); *United States v. Stowe*, 100 F.3d 494 (7th Cir. 1996) (upholding reasonableness of warrant execution where officers videotaped execution without warrant authorization).

CNN's presence as observer did not make unreasonable the agents' otherwise reasonable search. CNN Br. at 20-47.

C. The Bergers' Ignorance of the Fact They Were Being Recorded Is Not Constitutionally Relevant.

The Bergers argue the recording of their conversations with individuals ***they knew to be law enforcement agents executing a warrant***[10] violated the Fourth Amendment because they were not informed the conversations were being recorded. Resp. Br. at 22. The Bergers rely on *Silverman v. United States*, 365 U.S. 505 (1961), *Berger v. New York*, 388 U.S. 41 (1967), and *Alderman v. United States*, 394 U.S. 165 (1969). None of these cases sustains their claim.[11]

In *Silverman*, the Court held only that ***eavesdropping*** accomplished by ***unauthorized*** physical entry on defendants' premises violated the Fourth Amendment. 365 U.S. at 509, 511-12. In *Berger*, the Court struck down a statute permitting "***trespassory*** invasion of the home or office, by general warrant" to ***eavesdrop***. 388 U.S. at 64 (emphasis added). In *Alderman*, the Court affirmed that the Fourth Amendment "affords protection against the

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[10] The Bergers complain that their "private conversations were monitored and recorded." Resp. Br. at 15. They argue their "conversational privacy" was violated here. *Id.* at 24. However, they neglect to explain that the ***only*** conversations recorded were those in which ***the agents participated***. In other words, the Bergers claim a privacy interest in conversations they knowingly had with individuals they knew to be law enforcement agents, not in regard to conversations they had with one another alone.

[11] *Irvine v. California*, 347 U.S. 128 (1954), upon which the Bergers rely as well, also is of no avail. There the Court held law enforcement agents violated the Fourth Amendment when, without a warrant, they had a key made to the door of defendant's home and on three occasions entered it to install concealed microphones. *Id.* at 131.

uninvited ear" and that "oral statements, if illegally ***overheard***, and their fruits are . . . subject to suppression." 394 U.S. at 171 (emphasis added). Neither *Silverman*, *Berger*, nor *Alderman* involved a government agent as party to the conversations recorded. In marked contrast, the microphone worn by the agent here only recorded conversations in which he was a participant – not an eavesdropper – and which took place on property where he had a right to be by virtue of the warrant or Mr. Berger's consent.

Further, the Bergers argue that "[t]he deceptive means"[12] by which the agents recorded the Bergers' conversations with the agents "underscores" the extent of the Fourth Amendment violation. Resp. Br. at 22. In support they cite *Gouled v. United States*, 255 U.S. 298 (1921), which fails to advance their argument. In *Gouled*, an army officer and business acquaintance of Gouled, at the direction of his army superiors, pretended to make a friendly call upon Gouled, thereby gaining admission to Gouled's office. While in Gouled's office, and unbeknownst to Gouled, the army officer seized and removed several documents later used against Gouled. *Id.* at 304. On these facts, the Court held simply that:

> whether entrance to the home . . . be obtained by [a government agent] by stealth, or through social acquaintance, or in the guise of a business call, . . . any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment. . . .

Id. at 306.

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[12] While the Bergers were not informed an agent was wearing a microphone, the record makes evident they knew they were being filmed and were speaking to government agents, and neither CNN nor the agents misrepresented CNN's identity. R. 8, Ex. 8, tape 8, page 13; *id.* tape 21, page 3.

To the contrary, the FWS agents – known by the Bergers to be officers executing a warrant – openly gained access to the Bergers' fields pursuant to a warrant and their home pursuant to Mr. Berger's consent, not by stealth or subterfuge, and, did not search for or seize anything in the house. R. 4, Ex. B at 108:11-12. Consequently, the Bergers' claim that they had a recognizable privacy right in such conversations cannot be accepted.

Moreover, the "uninvited ears" and "uninvited eyes" of CNN, Resp. Br. at 26, do not cure the infirmity of the Bergers' claim.[13] Because they did not have a recognizable privacy interest in conversations with the agents, the recording of those conversations – which the agents constitutionally could have quoted verbatim to anyone – did not violate the Fourth Amendment. *United States v. White*, 401 U.S. 745, 749 (1971) (defendant does not have "a justifiable and constitutionally protected expectation

[13] Despite having sued CNN asserting violation of the Fourth Amendment – and having ***prevailed*** against CNN before the Ninth Circuit on their state action claim – the Bergers charge here that CNN was a "constitutionally uncontrolled actor[ ]." Resp. Br. at 15, 18. They assert that "[t]he scope of the Media's activity could not be controlled. . . . " *Id.* at 34. However, it is manifest that government agents who permit private parties access to private property during a warrant execution – whether in direct aid of the search or, as here, to observe for broader law enforcement purposes – ***always*** remain constitutionally responsible for the private party's actions. *See, e.g., Buonocore v. Harris*, 65 F.3d 347, 359 (4th Cir. 1995) (plaintiff, subject to private search "carried on entirely independently of the official search and in areas not searched by law enforcement officers" and conducted by private party granted access by officers, stated *Bivens* claim against officers); *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) (reversing summary judgment for officers where they permitted private party to search for items not mentioned in warrant after officers had seized the one item listed in warrant).

that [the] person with whom he is conversing will not then or later reveal the conversation");[14] *Hoffa v. United States*, 385 U.S. 293, 302 (1966) ("[I]t is evident that no interest legitimately protected by the Fourth Amendment is involved" where law enforcement informant "was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence.");[15] *Lopez v. United States*, 373 U.S. 427, 438 (1963) (Where officer wore hidden microphone and was present at the invitation of the defendant, there would be no suppression of "statements made by [the defendant] to [the officer], statements which [the defendant] knew full well could be used against him by [the officer] if he wished."); *United States v. Rubio*, 727 F.2d

[14] The Bergers contend *White* "does not address the question presented" because the Court there merely reversed the Court of Appeals' decision which had been based on *Katz v. United States*, 389 U.S. 347 (1967), a case decided after the underlying events in *White*. Resp. Br. at 26 n.34. They neglect to mention that the *White* decision was based on two grounds: "In our view, ***the Court of Appeals misinterpreted both the Katz case and the Fourth Amendment*** and in any event erred in applying the Katz case to events that occurred before that decision was rendered by this Court." 401 U.S. at 747 (emphasis added). The Court, in the plurality decision announcing its judgment, then devoted all but the final paragraph of its opinion to analyzing the effect of *Katz* on the viability of the Court's earlier decisions concerning warrantless eavesdropping. It is upon this lengthy discussion that CNN relies and which today governs application of the invited informer doctrine.

[15] As here, the Court in *Hoffa* explained that the informant "did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. [The informant] was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence." 385 U.S. at 302.

786, 797 (9th Cir. 1983) (once consent is obtained from one with authority to give it, "any expectation of privacy has been lost.").

As the Court explained in *White*, the issue is not whether the person searched has a subjective expectation of privacy, but whether an expectation of privacy is "constitutionally 'justifiable.' " 401 U.S. at 752.

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

Id. at 751. Thus, the precise issue raised by the recording of the Bergers' conversations with the agents is whether the Bergers had a constitutionally justifiable expectation of privacy in such conversations.[16] Because the answer is

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[16] The Bergers urge the Court to reject the invited informer doctrine of *White*, *Hoffa*, and *Lopez* because they contend that in those cases "the government agent or third party informer did not violate the Fourth Amendment because they were all engaged in a legitimate law enforcement purpose," where as here the agents' purpose was "to assist commercial television." Resp. Br. at 26, 22. However, in none of these cases did the Court consider, let alone discuss, "law enforcement purposes." Rather, the inquiry of the invited informer doctrine is whether the privacy expectation asserted is reasonable. In any event, it is beyond dispute that the primary law enforcement purpose that brought the agents to the ranch was to search for evidence of wildlife crimes which they suspected – and had suspected since before CNN's interest in the subject, J.A. 52 ¶ 34 – Mr. Berger had committed. (The evidence seized would in fact lead to his conviction. J.A. 63 ¶ 83.) Moreover, additional law enforcement

no – being exclusively conversations the Bergers knowingly had with agents executing a warrant or whom they invited into their home – the fact the conversations were recorded has no bearing on the constitutional calculus.

> It is . . . untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder of transmitter as conducting an "unreasonable" and unconstitutional search and seizure.

Id. at 753.

D. CNN's Presence Did Not Convert the Search Into a Prohibited General Warrant or Writ of Assistance.

What is clear from the cases the Bergers and their amici cite in recounting the history of the Fourth Amendment, is that the Amendment was meant to protect against indiscriminate searches and seizures without the support of a precise and specific warrant or on behalf of the claims of a private individual.[17] In this regard, the

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purposes served by permitting CNN to observe the warrant's execution, CNN Br. at 21-34, certainly were not "illegitimate." Once an invasion of the Bergers' privacy was warranted to search for evidence of crime, it was not unreasonable for other, broader law enforcement aims to be served simultaneously through public exposure.

[17] *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 480 (1976) ("The problem posed by the general warrant is not that of intrusion per se, but of a general exploratory rummaging in a person's belongings. The Fourth Amendment addresses the problem by requiring a 'particular description' of the things to be seized. This requirement makes general searches impossible

Bergers argue that through CNN's mere presence as a witness to the agents' execution of the warrant, "[t]he warrant was used to authorize a Media search of the ranch and all of its structures" and, thereby, was "converted . . . into both a general warrant and a writ of assistance for the Media." Resp. Br. at 34. This contention is not supported by the case law cited or the unambiguous record below.

While "this Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity," *Tennessee v. Garner*, 471 U.S. 1, 13 (1985), the common law cited by the Bergers and their amici does not provide pertinent guidance here.[18] None of the cases supports, let alone affirmatively addresses, the contention that a search conducted ***pursuant to a particularized warrant*** and ***for law enforcement purposes*** – namely, the search for evidence of a crime – is made untoward by the presence of a third party ***observer***. Moreover, the Bergers' historical accounting does not support the notion that the primary law enforcement purpose of searching for evidence of crime somehow is eradicated by the concurrent advancement of

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and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.") (citations, quotation marks, and brackets omitted); *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603) (unlawful for sheriff to enter defendant's house against his will to execute warrant in support of a private party's claim against the defendant).

[18] Reference to the common law, however, has not led this Court to "simply fr[eeze] into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980); *accord Tennessee*, 471 U.S. at 13.

other law enforcement interests[19] ***and*** CNN's purpose of informing the public.

The record also cannot support the Bergers' charge that they were victims of a general warrant or writ of assistance. It is undisputed that the FWS suspected Berger was illegally killing protected wildlife ***before*** CNN expressed an interest in the subject, R. 3 at 2 ¶¶ 3-4; J.A. 21-25, 32-34, 40-42, and that the agents' reason for procuring and executing the search warrant was to locate evidence of such crimes. J.A. 21-25, 32-34, 40-42. Furthermore, nothing in the record supports an assertion that the agents searched for any items besides those particularly identified in the warrant, or searched for anything at all upon their consensual entry inside the Bergers' home.

In sum, it is not pre-colonial common law but the deep body of this Court's case law interpreting and applying the Fourth Amendment reasonableness standard which guides in determining, in light of "all the circumstances," *Maryland v. Wilson*, 117 S. Ct. 882, 884-85 (1997), the issue posed here. Given public interests of great import to a democratic society,[20] an asserted privacy interest not of constitutional magnitude, and the

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[19] The grant of access to CNN furthered the law enforcement interests of enabling public oversight of coercive government activity, deterring crime, and curbing potential police misconduct and danger to police. CNN Br. 21-34.

[20] As the Bergers readily acknowledge, "police agencies are subject to public, political control and, if appropriate, condemnation. Presumably their officials, and the governments they are part of, are subject to political repudiation or, at least, exposure for abuses." Resp. Br. at 19. The grant of access to CNN here played an important role in assuring the effectiveness of this check.

incremental impact of the challenged conduct on the privacy interest asserted, the Fourth Amendment reasonableness balance soundly favors the grant of access to CNN here as surrogate for the public.

CONCLUSION

CNN respectfully requests that the Court reverse the Ninth Circuit's holding that the Fourth Amendment was violated by the grant of access to CNN.

Respectfully submitted,

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